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COURT OF CRIMINAL APPEALS
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In the
Court of Criminal Appeals
of Texas

ROY OLIVER,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

On Appellant's Petition for Discretionary Review from
The Court of Appeals for the Fifth Court of Appeals District
Dallas County, Texas
In Cause No. 05-18-01057-CR

STATE'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Appellant was indicted for five offenses, but the State proceeded to trial on three: the murder of Jordan Edwards, and two charges of aggravated assault by a public servant against two other teenagers.[1] *See* Tex. Penal Code §§ 19.02(b)(1)–(2), 22.02(a), (b)(2)(A). Appellant pleaded not guilty to all three charges.[2] The jury acquitted Appellant of the two aggravated assault charges but convicted him of murder.[3] During the punishment phase, the jury rejected a claim of sudden passion and assessed punishment at 15 years' confinement and a $10,000 fine.[4]

The Dallas Court of Appeals affirmed Appellant's conviction in an unpublished opinion, overruling each of his 14 issues on appeal. *Oliver v. State*, No. 05-18-01057-CR, 2020 WL 4581644 (Tex. App.—Dallas Aug. 10, 2020, pet. granted) (mem. op., not designated for publication). Appellant petitioned this Court for discretionary review on four grounds. This Court granted Appellant's petition on a single ground: What triggers the State's burden to show that an immunized *Garrity* statement was not "used" by the prosecution?

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[1] Clerk's Record volume (CR) 1:29, 39, 55–56; Reporter's Record volume (RR) 6:4; RR12:5–8; RR19:30–33.
[2] RR19:31, 32, 33.
[3] CR2:384; RR27:19–20.
[4] CR2:414, 415; RR28:198.

Issue Presented

After Appellant murdered an unarmed teenager, he gave compelled *Garrity* statements to his police department's internal-affairs investigator. Following guidance from the D.C. Circuit Court of Appeals, the Dallas Court of Appeals held that Appellant had to lay a firm foundation, resting on more than mere suspicion, that his prosecution was tainted by exposure to the statement before the State had the burden to prove that the prosecutor did not use the statement and that all of its evidence was derived from legitimate independent sources. Did the court of appeals correctly hold that the State's burden was not triggered when there was no evidence of exposure to Appellant's statements?

STATEMENT OF FACTS

Appellant shoots Jordan Edwards in the head.

Around 11:00 p.m. on April 29, 2017, Jordan Edwards and four other teenagers were trying to leave a party in Balch Springs, Texas, when gunshots rang out down the street.[5] Appellant, an on-duty Balch Springs police officer who had been trying to break up the party, ran up to the car that Jordan was in and fired five times with his rifle as the car drove past his partner.[6] One of those shots hit Jordan, the front-seat passenger, in the head.[7]

Two separate investigations begin.

Two separate investigations into the shooting began: 1) a criminal investigation into whether Appellant committed a criminal offense, and 2) an internal-affairs investigation into whether Appellant violated department policy.[8]

The criminal investigation begins around midnight.

The criminal investigation began shortly after midnight on April 30, when the Balch Springs Police Department asked the Dallas

[5] RR19:105, 118, 201–04, 208, 211–13, 257, 262; RR20:89, 96, 140, 168, 171, 175–77, 187–88, 192, 217–18, 239–40.
[6] RR19:102, 105, 119, 121–22, 143, 183, 216–19; RR20:100–02, 143, 193–94, 207, 221, 238, 241, 254, 256; RR21:110–11, 150; RR22:142, 170–71; State's Exhibit (SE) 10.
[7] RR19:219, 264; RR23:125–26, 192–93, 222, 225–32.
[8] RR19:82–83, 298; RR21:142; RR29:23 (Court's Exhibit (CE) 4, p. 6).

County Sheriff's Office to conduct the criminal investigation into the shooting.[9]

Detective Juan Carranza of the Dallas County Sheriff's Office responded to the scene as lead detective in the criminal investigation.[10] He coordinated with other Dallas County Sheriff's detectives to collect evidence and interview witnesses.[11] A little after 2:00 a.m., the Public Integrity Unit from the Dallas County Criminal District Attorney's Office arrived and assisted in the criminal investigation, as well.[12]

The internal investigation begins around 3:00 a.m.

The separate internal-affairs investigation began three hours later, shortly after 3:00 a.m., when Lieutenant Mark Maret, one of the Balch Springs Police Department's internal-affairs officers, met with Appellant and his attorney at the Balch Springs Police Department.[13]

At the start of the meeting, Appellant's attorney tried to give Lt. Maret a pre-written statement, but Maret didn't accept it.[14] Instead, Lt. Maret gave Appellant an internal-investigation "packet"

[9] RR20:53–55; RR23:37, 134.
[10] RR23:133–35.
[11] RR23:35, 38–39, 41, 50, 134–36.
[12] RR23:137–38.
[13] RR19:297–304.
[14] RR19:302–03.

that included an "investigative warning" and a "constitutional protection statement."[15]

The "investigative warning" ordered Appellant to give a "written statement" in response to allegations that he may have violated department policy.[16] It expressly threatened Appellant that he could be fired if he refused to make a written statement:

> The attached documents contain allegations that have been made against you. Those allegations, if true, may constitute one or more violations of personnel rules of the City of Balch Springs or of the Balch Springs, Texas Police Department General Orders Manual or of local, state, or federal law. You are directed to make written statement [sic] in response to those allegations immediately. Your failure or refusal to do so may subject you to disciplinary action, including discharge from employment with the Balch Springs Police Department. Your statement as well as any information or evidence which is gained through your statement cannot be used against you in any criminal proceeding except that you may be subject to criminal prosecution for any false statement which you may make.[17]

Then at 3:20 a.m., Appellant signed the "constitutional protection statement," which stated that he was being compelled to give a statement as a condition of employment:

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[15] RR19:299–303.
[16] RR29:16 (CE 3).
[17] RR29:16 (CE 3).

> … I was ordered to submit this report/give this statement by Lt. Mark Maret #239.
>
> I submit this report or give this statement at [Lt. Maret's] order as a condition of employment. In view of possible job forfeiture, I have no alternative but to abide by this order.
>
> It is my belief and understanding that the department requires this report or statement solely and exclusively for internal purposes and will not release it to any other agency or use it for any other purposes. It is my further belief that this report or statement will not and cannot be used against me in any subsequent proceeding other than disciplinary proceedings within the confines of the department itself.
>
> For any and all other purposes, I hereby reserve my Constitutional Rights to remain silent under the FIFTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION and other rights prescribed by law. Further, I rely specifically upon the protection afforded me under the doctrines set forth in GARRITY VS. NEW JERSEY, 385 U.S. 493 (1967), and SPEVACK VS. KLEIN, 385 U.S. 511 (1967), should this report or statement be used for any other purposes of whatsoever kind or description.[18]

After Appellant and his attorney watched video from his body-worn camera, Appellant's attorney handed Lt. Maret the pre-written typed statement that she had offered earlier, which Maret put in the

[18] CR2:316; RR19:303; RR29:14 (CE 3).

"internal affairs file."[19] That file exists in electronic and paper form.[20] Lt. Maret, Balch Springs Police Lt. Brent Hurley, and Balch Springs Police Chief Jonathan Haber are the only three people who have access to the electronic file, while Maret and Haber are the only two with access to the paper file, which is locked in a file cabinet.[21]

Lt. Maret "probably" showed the statement to Lt. Hurley, because Hurley also does internal-affairs investigations, and the two officers consult with each other.[22] Both men know that internal-affairs investigations are separate from criminal investigations and neither talked with any of the criminal investigators.[23] Lt. Maret also showed Appellant's statement to Chief Haber, who had originally ordered the internal-affairs investigation.[24] Lt. Maret could not remember whether Chief Haber saw the statement before or after the internal-affairs investigation was completed.[25]

The criminal investigation continues into the next morning.

Around 5:00 a.m.—about an hour and a half after Appellant met with Lt. Maret—Det. Carranza called Appellant's attorney and asked her if Appellant would participate in a "walk-through" of the

[19] RR19:304–05.
[20] RR19:332.
[21] RR19:332.
[22] RR19:311, 312–13.
[23] RR19:313.
[24] RR19:311, 323.
[25] RR19:312.

scene as part of the criminal investigation.[26] She agreed and arrived at the scene "[f]ive or six minutes later" with Appellant, who also agreed to do the walk-through.[27] During this walk-through, which began at 5:16 a.m. and ended at 5:30 a.m., Appellant described for Det. Carranza and other Dallas County Sheriff's Office detectives what happened during the shooting.[28]

Lt. Maret had come to the scene and was present for the walk-through, but he didn't do anything: he stood back, he didn't talk to anyone or ask any questions, and he didn't hear any of the questions or answers.[29]

The internal investigation continues two days later.

Lt. Maret didn't speak with Appellant any more about the case until May 2, when he called Appellant and asked him to participate in a follow-up interview.[30] At the start of that interview, Lt. Maret gave Appellant another investigative warning, which Appellant signed.[31] Lt. Maret then asked Appellant some follow-up questions; this oral interview was audio recorded and made "part of" the internal-affairs file.[32]

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[26] RR20:42–43.
[27] RR20:43.
[28] RR20:11, 43.
[29] RR19:306, 329, 337; RR20:12.
[30] RR19:305, 310–11, 314.
[31] CR2:318; RR19:315.
[32] RR19:317, 338.

The criminal investigation results in an arrest warrant and, ultimately, an indictment.

On May 5, six days after the shooting, Det. Carranza obtained an arrest warrant for Appellant, which was based mainly on witness interviews and video from Appellant's and his partner's body-worn cameras.[33] Neither Det. Carranza nor the other lead detective on the case, Det. Billy Fetter, were ever aware that Appellant had given a statement to Lt. Maret.[34]

On July 17, a grand jury indicted Appellant on one charge of murder and four charges of aggravated assault by a public servant.[35] Lt. Maret never spoke with any of the grand-jury witnesses about the case.[36]

Lt. Maret delivers Appellant's internal-affairs file to Lt. Rendon, who scrubs the file and later delivers it to the court.

In June 2017, the lead prosecutor on the case had asked Lt. Maret to bring Appellant's internal-affairs file to Lt. Lupita Rendon, an investigator with the District Attorney's Office.[37] Maret personally delivered the file to Lt. Rendon.[38]

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[33] RR23:139.
[34] RR20:14, 54.
[35] C.R.1:29,39, 55–56; RR6:4; RR12:5–8; RR19:30–33.
[36] *Compare* RR19:317–320 *with* CR1:780 (listing names of grand jury witnesses).
[37] RR19:333–34.
[38] RR19:334.

The District Attorney's Office has an officer-involved-shooting policy that details "a procedure for dealing with internal-affairs investigation information that's obtained from various law enforcement agencies."[39] The policy requires that before any internal-affairs file is "reviewed by anybody who could be involved in a prosecution effort," the file must be reviewed by an individual who removes any *Garrity* material and who is then "walled-off from any other role … in the prosecution effort."[40] In accordance with this policy, Lt. Rendon was the "one person in the office" who looked at Appellant's file.[41]

During a discovery hearing a year later, in June 2018, Appellant asked the court to order the State to turn over any *Garrity* statements in his internal-affairs file.[42] One of the prosecutors, Jason Hermus, demurred and pointed out that he didn't even know if such statements existed.[43] He told the court that Lt. Rendon, who was "not part of the prosecution team," would have followed the office's procedures for scrubbing *Garrity* material and was therefore the only person who would have had access to it.[44] The court "granted"

[39] RR20:66.
[40] RR20:66–67.
[41] RR17:23–24.
[42] RR12:170–76.
[43] RR12:172.
[44] RR12174–75.

Appellant's discovery request, and Hermus told the court that he would "find out if there is" a sealed file to turn over to the defense.[45]

After the hearing, Hermus asked Lt. Rendon to personally deliver Appellant's internal-affairs file to the court.[46] Two weeks later, during an in-chambers *ex parte* hearing between only defense counsel and the judge, the judge told defense counsel that he "ha[d]" the "*Garrity* stuff" that the court had ordered turned over, but that he "ha[d]n't gone through it all" yet.[47] During trial, the court told everyone that Lt. Rendon "did" deliver the file to the court.[48]

Hermus testified during a hearing that, as a result of this procedure, he did not even know that Appellant had actually given a *Garrity* statement until a week before trial, when Appellant first raised the issue in a writ application.[49]

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[45] RR12:175–76.
[46] RR20:69.
[47] RR13:10.
[48] RR20:69.
[49] RR17:4; RR20:70. The writ application is not in the record, but the State's written response is. C.R.1 at 850–857. The attachments to the application are also in the record, because Appellant also attached them to his later motion to recuse, still labelled as exhibits for a "Writ of Habeas Corpus." C.R.2 at 316–36. These attachments, which are in a sealed volume of the clerk's record, apparently included the written *Garrity* statement at issue, on pages 319–20. Upon discovering this possibility during the intermediate appellate proceedings, the undersigned prosecutor deleted those two pages from the State's copy of the record and notified Appellant's attorney, who acknowledged the removal and raised no objections.

SUMMARY OF THE ARGUMENT

A person who gives a statement that is compelled by a *Garrity* warning has use and derivative use immunity for that statement. A *Kastigar* inquiry protects that immunity. The goal of the inquiry is to place both the defendant and the prosecution in substantially the same position as if the defendant had claimed his Fifth Amendment privilege and not made a statement at all.

In most cases that address this issue, the immunized statement was made before a grand jury, or under an express grant of immunity from a prosecutor, or even on live television. In such cases, there is no question that witnesses, the grand jury, or the prosecution were exposed to the immunized statement, and the *Kastigar* inquiry is simple: The defendant must show that he made the immunized statement, after which the State must prove by a preponderance of the evidence that it did not use the statement and that its evidence is derived from legitimate independent sources.

But when the statement is made in a proceeding that is completely walled off from the criminal investigative process—such as an administrative internal-affairs investigation—this inquiry is incomplete. If the witnesses, grand jury, and prosecution team in the criminal proceeding were never exposed to the statement in the first place, then there is no potential constitutional violation for the State to disprove. In that case, it's not enough for the defendant to show

just that he made an immunized statement. The defendant must lay a firm foundation, resting on more than mere suspicion, that the State's evidence had been tainted by exposure to the statement. Only then can the State fairly be put to the burden of showing that it did not use the statement and that its evidence is derived from legitimate independent sources.

That's exactly what the court of appeals held in this case. The court didn't say that Appellant had the burden to show that the prosecution used his immunized *Garrity* statements. Instead, the court said that, in order for the State to have the burden of proving that it didn't use the statements, Appellant first had to "bring to the trial court some showing that the State's evidence had been tainted by exposure to those immunized statements."

And Appellant didn't do that. The court of appeals, deferring to the trial court's factual findings, concluded that Appellant "made no showing that any witness was exposed to his Written or Recorded Statements, either directly or through any law enforcement official," that "nothing in the record supports a suggestion that any member of the Dallas District Attorney's Office—other than Lt. Rendon—was aware of the Garrity statements' existence," and that nothing in the record "indicat[ed] that Lt. Rendon participated in the investigation or presentation of appellant's case in any fashion."

The court held that the State would have had the burden to show that it didn't use Appellant's *Garrity* statements if Appellant had made some showing of exposure. But Appellant failed to offer anything other than suspicion for his accusations. That relieved the State of its burden in this case. The court of appeals didn't shift the State's heavy burden to Appellant; the court simply found that Appellant didn't meet the minimal burden he already had.

ARGUMENT

The court of appeals correctly held that the State has the burden to show that it didn't use Appellant's *Garrity* statements only if Appellant first lays a foundation resting on more than suspicion that the State's evidence had been tainted by exposure to the statement.

Introduction

This case isn't about whether a defendant has Fifth-Amendment-based use and derivative use immunity for *Garrity* statements. He does. *See Garrity v. New Jersey*, 385 U.S. 493, 497–500 (1967); *Lefkowitz v. Turley*, 414 U.S. 70, 79–80 (1973). This case isn't about whether Appellant's written and oral statements to Lt. Maret were immunized *Garrity* statements. They were. *See United States v. Trevino*, 215 Fed. Appx. 319, 321 (5th Cir. 2007); *United States v. Friedrick*, 842 F.2d 382, 395 (D.C. Cir. 1988). This case isn't about whether the State has the burden of proving an "independent source" for its evidence if grand jurors, witnesses, or the prosecution team were exposed to a *Garrity* statement. It does. *See Kastigar v. United States*, 406 U.S. 441, 461–62 (1972); *United States v. Daniels*, 281 F.3d 168, 180 (5th Cir. 2002).

This case is about who has the burden of showing that there was any exposure in the first place. The vast majority of *Garrity/Kastigar* case law doesn't answer this question. That's because in most cases, the fact of exposure is undisputed—the

defendant responded to a subpoena and testified, the prosecutor read files that contained immunized statements or personally granted immunity, or a grand-jury or trial witnesses heard or learned about immunized testimony. In such cases, the courts have consistently held the government to its burden of proving that the prosecution didn't use the statements and that all its evidence was derived from legitimate independent sources.

This case is different because the issue of whether there was exposure was disputed. Appellant unquestionably made *Garrity* statements to Lt. Maret, but there is no evidence in the record that any witness, grand juror, or member of the prosecution team was ever exposed to those statements. Who had a burden to show that?

The Supreme Court hasn't directly answered this question, but the D.C. Circuit Court of Appeals has. In *United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011), the D.C. Circuit concluded that "the defendant bears the burden of laying a firm foundation resting on more than suspicion that proffered evidence was tainted by exposure to immunized testimony." *Id.* at 551 (cleaned up).

The D.C. Circuit didn't make that up out of whole cloth. It had previously recognized that the Supreme Court has answered this question in the broader, Fifth-Amendment immunity context, of which *Garrity* is a subset. *United States v. North*, 920 F.2d 940, 949 n.9 (D.C. Cir. 1990) (*North II*). Specifically, in *Lawn v. United States*,

355 U.S. 339 (1958), the Supreme Court held that a defendant had to have more than "unsupported suspicions" to be entitled to a hearing on whether a grand jury was exposed to immunized statements. *Id.* at 348–50. The D.C. Circuit concluded that such a showing is what triggers the government's *Kastigar* burden.

This is a reasonable requirement. The point of use and derivative use immunity is to ensure that both the defendant and the prosecution are "in substantially the same position as if" the defendant had claimed his Fifth Amendment privilege against self-incrimination in criminal cases. *Slough*, 641 F.3d at 552 (quoting *Kastigar,* 406 U.S. at 458–59). To put the State to its heavy burden of proving that the prosecution made no use of his statement and that all of its evidence was derived from legitimate independent sources, a defendant should have to present some showing of exposure, rather than just make unsupported accusations.

The D.C. Circuit's opinion in *Slough* isn't binding on Texas courts, but the court of appeals properly found it to be persuasive and correctly applied its reasoning in this case. *Oliver*, 2020 WL 4581644, at *2–6. Appellant claimed at trial that his *Garrity* statements were in the "possession" of the District Attorney's Office, and he asserted that the office had "access" to them, but he never backed up those accusations with any evidence.

The court of appeals, deferring to the trial court's factual findings, concluded that Appellant had not shown anything more than suspicion that the prosecution team or witnesses were exposed to his *Garrity* statements. The court therefore correctly applied the burdens laid out in *Slough*, *North II*, and *Lawn* for this type of case. This didn't shift any burden to Appellant; it merely held him to a burden he already had.

To fully develop these points, this brief will proceed as follows. First, the brief will explain the basis for *Garrity* immunity under the Fifth Amendment. Then the brief will describe the scope of that immunity—how its protections depend on the type of exposure in a criminal case. Next, the brief will discuss the traditional *Kastigar* inquiry that is designed to protect a defendant's immunity in a criminal case, and it will explain why the two-step version of this inquiry is insufficient in a case where exposure is disputed. Then the brief will discuss how the D.C. Circuit resolved this insufficiency in *Slough*, by treating the inquiry as a three-step process.

At that point, the brief will explain why, even though the D.C. Circuit's analysis isn't binding on Texas courts, the court of appeals reasonably relied on it as persuasive authority in this case, and this Court should do the same. Finally, the brief will explain that the *Slough* rule does not result in "burden shifting," and that it does not require Appellant to "disprove use."

1. A person who makes a *Garrity* statement has use and derivative use immunity for the statement in a criminal case.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. One type of "compelled" statement is known as a *Garrity* statement: Under *Garrity*, when a person makes a statement under an express threat, or an objectively reasonable belief, that he will be fired from his job if he refuses to make the statement, that statement is "compelled," and it cannot be used against the person in a criminal case. *Garrity*, 385 U.S. at 499–500; *Friedrick,* 842 F.2d at 394; *Chapman v. State*, 115 S.W.3d 1, 6 n.15 (Tex. Crim. App. 2003).

When a person makes a compelled statement, his Fifth Amendment privilege is protected by giving him immunity that is coextensive with the scope of the privilege. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 54 (1964). Immunity that is coextensive with the Fifth Amendment privilege is use and derivative use immunity, rather than transactional immunity. *United States v. Hubbell*, 530 U.S. 27, 38 (2000); *Kastigar*, 406 U.S. at 453; *see also Ex parte Shorthouse*, 640 S.W.2d 924, 927–28 (Tex. Crim. App. 1982). This is because the purpose of immunity is to leave both the person and the government "in substantially the same position as if" the person had claimed his Fifth Amendment privilege and not made a statement at

all. *Hubbell*, 530 U.S. at 40; *Kastigar*, 406 U.S. at 458–59. The purpose of an independent-source inquiry is to "remov[e] any net effect on either side." *Slough*, 641 F.3d at 552.

Fifth-Amendment-based use and derivative use immunity for compelled statements is a "prophylactic rule[] designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Chavez v. Martinez*, 538 U.S. 760, 770–71 (2003) (plurality op.). As a result, the Fifth Amendment right itself is violated only when a compelled statement is used in a criminal case. *Id.*; *see also Hubbell*, 530 U.S. at 42 (noting that a compelled testimonial act by Hubbell was "the first step in a chain of evidence" that led to his prosecution).

2. The prohibition on use and derivative use differs slightly between, on the one hand, evidence and witnesses, and on the other hand, prosecutors.

As a prophylactic protection of a constitutional right, use and derivative use immunity has different applications depending on the context.

The prohibition on use and derivative use is extremely restrictive with respect to evidence and witnesses. It means that a compelled statement cannot be used as an investigatory lead or to focus an investigation on the person who made the statement. *Kastigar*, 406 U.S. at 460. The statement may not be presented at

trial or before a grand jury. *United States v. Nanni*, 59 F.3d 1425, 1431 (2d Cir. 1995). The statement cannot be used to motivate another witness to give incriminating testimony, or to shape questions asked of witnesses, or to locate or identify witnesses. *United States v. Rinaldi*, 808 F.2d 1579, 1583–84 (D.C. Cir. 1987). And the statement cannot be used to shape, alter, or affect another witness's testimony, to refresh their memory, to focus their thoughts, organize their testimony, alter their prior or contemporaneous statements, or influence their decision to testify. *North II*, 920 F.2d at 942; *United States v. North*, 910 F.2d 843, 860 (D.C. Cir. 1990) (*North I*).

But use and derivative use immunity is slightly less restrictive with respect to prosecutors. A majority of the federal circuit courts that have addressed the issue have held that it does not limit the exercise of prosecutorial discretion, including decisions to indict or the prosecutor's thought processes in preparing for trial. *See Slough*, 641 F.3d at 549; *United States v. Cozzi*, 613 F.3d 725, 729 (7th Cir. 2010); *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States v. Mariani*, 851 F.2d 595, 600–01 (2d Cir. 1988); *United States v. Crowson*, 828 F.2d 1427, 1431–32 (9th Cir. 1987); *United States v. Byrd*, 765 F.2d 1524, 1528–31 (11th Cir. 1985). *But see United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). That's because such

a rule would effectively turn use immunity into transactional immunity, which is beyond the scope of the Fifth Amendment's protection. *Slough*, 641 F.3d at 553–54.

Any analysis of the protection provided by a defendant's use and derivative use immunity must therefore look at both: 1) whether the government's *evidence* (including witnesses, both at trial and before the grand jury) was tainted by exposure to an immunized statement; and 2) whether the *prosecutor* made impermissible "use" of an immunized statement. *See North II*, 920 F.2d at 942 (distinguishing between prosecutors' exposure and witnesses' exposure).

The remedy for an immunity violation depends on the type of exposure. If trial evidence was tainted by exposure to an immunized statement, that evidence should be excluded—suppressed—from trial. *North I*, 910 F.2d at 872–73. If grand jury testimony was tainted by exposure to the immunized statement, the indictment must be dismissed. *Id.* If the prosecutor was exposed to the immunized statement, he may properly "remove[] any cloud from the trial by assigning it to another attorney who did not and would not review the immunized testimony," but mere exposure does not per se disqualify a prosecutor if the exposure did not lead to impermissible "use." *Slough*, 641 F.3d at 554; *Daniels*, 281 F.3d at 182; *Crowson*, 828 F.2d at 1429; *Byrd*, 765 F.2d at 1531–32;

Semkiw, 712 F.2d at 895. Several courts have held that mere "tangential" influence on the prosecutor is not impermissible use. *Daniels*, 281 F.3d at 182 (citing *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992); *Mariani*, 851 F.2d at 600)

3. The *Kastigar* inquiry protects the defendant's use and derivative use immunity in criminal cases.

To protect a defendant's use and derivative use immunity in criminal cases, the Supreme Court has held that when a defendant has given compelled testimony, the government must prove by a preponderance of the evidence that its evidence was derived from independent legitimate sources. *Kastigar*, 406 U.S. 461–62; *North I*, 910 F.2d at 854.

3.1. The *Kastigar* inquiry is usually treated as a two-step process.

In *Kastigar*, the defendant had been subpoenaed to testify before a federal grand jury. *Id.* at 442. Prosecutors, believing that Kastigar would assert his Fifth Amendment privilege, gave him immunity under 18 U.S.C. § 6002, which allows a federal court, grand jury, prosecutor, or Congress to grant a witness immunity if the witness refuses testify or provide other information in a proceeding. *Id.* The court approved the grant and ordered Kastigar to testify. *Id*. When he refused to answer questions, the court held him in contempt. *Id.*

Kastigar challenged the contempt order, arguing that the use and derivative use immunity under section 6002 is not coextensive with the Fifth Amendment privilege. *Id.* at 443, 448. The Supreme Court disagreed and held that use or derivative use immunity is sufficient to protect the privilege, and so Kastigar could be held in contempt for refusing to answer questions before the grand jury. *Id.* at 453, 461–62.

Along the way, the Supreme Court explained that the reason use and derivative use immunity protects the privilege is that the burden of proof rests on the government to prove that its evidence is not tainted:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."
>
> This burden of proof … is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Id. at 460 (quoting *Murphy*, 378 U.S. at 79 n.18).

In later cases, this inquiry is usually treated as a two-step process:

1) Did the defendant testify under a grant of immunity? and
2) If so, did the government prove by a preponderance of the evidence that its evidence was derived from legitimate independent sources?

See, e.g., *Hubbell*, 530 U.S. at 40; *Daniels*, 281 F.3d at 180; *Nanni*, 59 F.3d at 1431–32; *North I*, 910 F.2d at 854; *Serrano*, 870 F.2d at 14–15; *Rinaldi*, 808 F.2d at 1582; *Semkiw*, 712 F.2d at 894; *McDaniel*, 482 F.2d at 309; *United States v. Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972).

3.2. But the two-step inquiry presupposes exposure.

This two-step inquiry presupposes that government officials or witnesses involved in the criminal proceeding were exposed to the immunized statement. That's because the cases that apply it address situations in which government officials or witnesses were necessarily exposed to the statement, and the remedy for a violation (suppression, dismissal, recusal) turns on the type of exposure that was involved.

The most common exposure situation occurs when, like in *Kastigar*, a defendant is granted immunity under 18 U.S.C. § 6002, but then, unlike in *Kastigar*, he testifies or provides evidence under that grant. In *Hubbell*, the defendant produced documents in response to a grand jury subpoena, and that testimonial act of production led the Independent Counsel, who issued the subpoena,

to investigate him and, ultimately, to have him indicted for various federal crimes. *Hubbell*, 530 U.S. at 30–32, 36, 40.

In *North*, the defendant testified before Congress under a grant of immunity, his testimony was broadcast live on television and radio, "a considerable number" of grand jury and trial witnesses had "their memories refreshed by the immunized testimony," and some of those witnesses talked to the Independent Counsel after watching the testimony. *North I*, 910 F.2d at 851, 860, 864–65. And in *Semkiw*, the defendant testified before a federal grand jury under a grant of immunity, after which he was indicted for the offense that he testified about, and his case was tried by a prosecutor who had access to his grand jury testimony. *Semkiw*, 712 F.2d at 892, 895.

In each of these statutory-immunity cases, the testimony or production itself exposed someone—either the witnesses, the prosecutor, or the grand jurors—and the government had the burden of proving that its evidence was not tainted by the exposure and was derived from legitimate independent sources. *Hubbell*, 530 U.S. at 42–45; *North I*, 910 F.2d at 872–73; *Semkiw*, 712 F.2d at 894.

Exposure is also present in cases that are not based on section-6002 immunity. In *Daniels*, the defendant, a prison guard, gave two *Garrity* statements to an internal investigator, who then discussed the defendant's involvement with the criminal investigator and gave

the investigator a file that contained a copy of the defendant's statements. *Daniels*, 281 F.3d at 175–76.

In *Nanni* and *McDaniel*, the defendants testified before state grand juries under immunity grants; a federal criminal investigator read Nanni's testimony, while a federal prosecutor read McDaniel's. *Nanni*, 59 F.3d at 1429; *McDaniel*, 482 F.2d at 307. In *Serrano*, the defendant testified before the Puerto Rico House of Representatives under a grant of immunity from local prosecution, but an FBI agent watched the testimony and then testified before the federal grand juries that indicted the defendant. *Serrano*, 870 F.2d at 13.

In *Rinaldi*, the defendant worked as an informant for a federal prosecutor who promised him immunity, but then the government prosecuted him by using witnesses who had either heard, or been revealed by, his immunized statements. *Rinaldi*, 808 F.2d at 1581–82, 1583–84. Finally, in *Seiffert*, the defendant testified in a bankruptcy proceeding under immunity granted by the Bankruptcy Act, but then the government prosecuted him for misappropriating funds based in part on that testimony. *Seiffert*, 463 F.2d at 1091–92.

In each of these cases, as with the section-6002 cases, the testimony itself constituted exposure, and therefore the government had the burden, under *Kastigar*, to prove that its evidence was derived from legitimate independent sources. *Daniels*, 281 F.3d at 180–81; *Nanni*, 59 F.3d at 1431–32; *McDaniel*, 482 F.2d at 310–12;

Serrano, 870 F.2d at 14; *Rinaldi*, 808 F.2d at 1582; *Seiffert*, 463 F.2d at 1092.

Indeed, in most cases based on *Garrity* or *Kastigar*, exposure was obvious and therefore undisputed. That's true of both federal cases[50] and state cases.[51]

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[50] *See*, *e.g.*, *United States v. Allen*, 864 F.3d 63, 92–93 (2d Cir. 2017) (key cooperating witness had read defendant's compelled testimony); *Cozzi*, 613 F.3d at 727 (soon-to-be police chief reviewed defendant's internal-affairs file and then emailed a tip to the FBI, who prosecuted defendant); *United States v. Veal*, 153 F.3d 1233, 1237–38 (11th Cir. 1998) (FBI reviewed *Garrity* statements taken by state homicide investigators, in which defendants made false statements, which led to federal indictments); *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1991) (all trial witnesses "had previously been exposed to the defendant's immunized testimony"); *United States v. Schmidgall*, 25 F.3d 1523, 1526–27 (11th Cir. 1994) (defendant made statements in interview with Assistant United States Attorney, U.S. Customs agent, IRS agent, and U.S. Coast Guard Lieutenant after being granted immunity, after which FBI agent read notes from that interview and then spoke with another witness in the case and continued investigating); *United States v. Harris*, 973 F.2d 333, 334–36 (4th Cir. 1992) (defendant, after being granted immunity, was "debriefed" by federal prosecutor and criminal investigators, identified incriminating documents, and testified before federal grand jury); *United States v. Palumbo*, 897 F.2d 245, 247 (7th Cir. 1990) (defendant made immunized "proffer" to FBI agent, who then testified before the grand jury); *United States v. Tantalo*, 680 F.2d 903, 905 (2d Cir. 1982) (defendant testified before federal grand jury and prosecutor under grant of immunity).

[51] *See*, *e.g.*, *State v. Carapezza*, 272 P.3d 10, 12–13 (Kan. 2012) (county attorney granted use and derivative use immunity to defendants, who testified at "inquisitions" where other witnesses were present, and prosecutors and law enforcement were exposed to testimony); *State v. Jackson*, 125 Ohio St.3d 218, 2010-Ohio-621, 927 N.E.2d 574, ¶¶ 3, 7, 8 (investigator who took defendant's *Garrity* statement testified before the grand jury, and trial prosecutor had a copy of the *Garrity* statement as well); *State v. Gault*, 551 N.W.2d 719, 721–22 (Minn. Ct. App. 1996) (defendants, both sheriff's deputies, gave *Garrity* statements to sheriff's department, which forwarded entire file to city attorney's office, where at least two assistant city attorneys reviewed the file, and one of those discussed the merits of the case with the prosecutor who was ultimately

And even in *Garrity* itself, the defendant's compelled statement was made to the prosecutor, not an internal-affairs investigator. Garrity was a New Jersey police officer, whom the Attorney General was investigating for fixing traffic tickets. *Garrity*, 385 U.S. at 495. A deputy Attorney General interviewed Garrity. *Id.* at 502–03 (Harlan, J., dissenting).

The deputy Attorney General warned Garrity, in accordance with New Jersey state law, that 1) anything he said might be used against him in a criminal proceeding, 2) he had a right to refuse to give incriminating answers, but 3) he would be subject to removal from office if he refused to answer. *Id*. at 494. Upon receiving these warnings, Garrity answered the prosecutor's questions, and some of his answers were used in the subsequent prosecution. *Id.* at 495.

Thus, each of these cases, the defendant showed that he testified or produced evidence under a grant of immunity—and that testimony or production was itself exposure to the prosecution or witnesses. None of these cases addressed the specific question of who has the burden to show exposure in the first place.

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assigned the case); *State v. Munoz*, 1985-NMSC-061, ¶¶ 4–5, 103 N.M. 40 (defendant testified at co-defendant's trial under grant of immunity, same prosecutor tried both defendants, and three officers who were present during immunized testimony testified at defendant's trial).

4. *Slough* articulated a three-step version of the *Kastigar* inquiry that protects the defendant's use and derivative use immunity when exposure is disputed.

Because exposure is typically undisputed, courts have rarely had to wrestle with the question presented in this case: When does the State assume the burden to disprove use of an immunized statement when there is no evidence that the State or its witnesses were ever exposed to the statement?

The Supreme Court hasn't answered this question. *Garrity* dealt with a statement that the defendant made directly to the prosecutor. *Garrity*, 385 U.S. at 494–95. *Kastigar* simply set out a two-step inquiry to be used when a defendant "testifies" under a grant of immunity. *Kastigar*, 406 U.S. at 460. And in *Hubbell*, the defendant produced documents in response to a grand jury subpoena that the prosecutor had issued. *Hubbell*, 530 U.S. at 30–32, 36, 40.

The D.C. Circuit, however, has recognized that the inquiry is slightly different when there is no evidence that the government's evidence was tainted by exposure to immunized testimony. In *Slough*, the defendants, who were Blackwater contractors in Iraq, gave *Garrity* statements to the State Department during an investigation into a shooting incident in Baghdad. *Slough*, 641 F.3d at 547–48.

The State Department, apparently relying in part on these statements, prepared an "incident report" that was quoted by the

news media. *Id.* at 548. Additionally, someone leaked the *Garrity* statements to the media, which published them. *Id.* at 548–49. Some grand-jury witnesses admitted that they read some of these news reports. *Id.* at 549. In response, the federal government presented a "redacted" case to a second grand jury, which indicted the defendants. *Id.*

The defendants filed a motion to dismiss, and, after a *Kastigar* hearing, the district court dismissed the indictments. *Id.* The district court concluded that "exposure to the defendant's statements had tainted much of the evidence presented to the second grand jury … and had also tainted the prosecutors' decision to indict." *Id.*

The Court of Appeals for the D.C. Circuit reversed. *Id.* at 548. In reviewing the district court's dismissal, the D.C. Circuit emphasized that *Kastigar*'s protection against use and derivative use means that in a criminal prosecution of a person who gave immunized testimony, "the government cannot use his immunized testimony itself or any evidence that was tainted … by exposure to the immunized testimony." *Id.* at 549.

The issue before the D.C. Circuit was what to do when the content or availability of evidence "is derived from *both* immunized statements and independent factors." *Id.* at 550 (emphasis in original). The problem was that the district court had treated the testimony of the witnesses as "single lumps" and excluded them "in

their entirety when at the most only some portion of the content was tainted." *Id.* The district court had excluded parts of evidence that "could not have been tainted" because those parts did not "overlap" with the immunized statements. *Id.*

The D.C. Circuit recognized that it didn't make sense to hold the State to a burden of showing an independent source for that kind of evidence. The Court complained that the district court had "found that the government had failed to fulfill its burden; yet the court never identified what the government could have done besides pointing to the complete absence of overlap, or why it should have been required to show more." *Id.*

Thus, the Court held, the district court could not treat witness testimony as a lump. Instead, it needed to review potentially tainted testimony "line-by-line" to determine whether it could "segregate tainted parts of the evidence from those parts that either could not have been tainted (because there is no overlap) or were shown to be untainted by a preponderance of the evidence." *Id.* at 550–51.

But, the Court noted, to be entitled to this hearing, "the *defendant* bears the burden of laying 'a firm "foundation" resting on more than "suspicion"' that proffered evidence was tainted by *exposure* to immunized testimony." *Id.* at 551 (quoting *North II*, 920 F.2d at 949 n.9 (itself quoting *Lawn*, 355 U.S. at 348–49)) (emphasis

added). And not even "prior exposure" would meet that burden, the Court said, for "completely non-overlapping points." *Id.*

If prior exposure to immunized testimony doesn't entitle a defendant to a *Kastigar* hearing as to "non-overlapping points," then no exposure at all doesn't entitle a defendant to a *Kastigar* hearing as to any points. If there is no exposure, then—as far as the criminal proceeding is concerned—it is as if the defendant never made the statement at all.

That's exactly what use and derivative use is meant to accomplish: It leaves both the person and the government "in substantially the same position as if" the person had claimed his Fifth Amendment privilege and not made a statement at all. *Hubbell*, 530 U.S. at 40; *Kastigar*, 406 U.S. at 458–59. If there is no exposure, there is no "net effect on either side" that needs to be removed. *See Slough*, 641 F.3d at 552. If there is no exposure, there is no constitutional violation to be remedied with suppression, dismissal, or recusal.

Thus, under *Slough*, the *Kastigar* inquiry is a three-step process:

1) Did the defendant make a compelled statement?
2) If so, did the defendant lay a firm foundation resting on more than suspicion that the State's evidence was tainted by exposure to that statement? and

3) If so, did the government prove by a preponderance of the evidence that its evidence was derived from legitimate independent sources?

The additional step isn't so much an addition to the *Kastigar* analysis as it is an application of it. Compelling a statement, alone, isn't a Fifth Amendment violation; the violation comes from using that statement in a criminal proceeding. *Chavez*, 538 U.S. at 770–71; *Hubbell*, 530 U.S. at 42.

A defendant who shows that he "testified under a grant of immunity" has shown that his compelled statement was possibly used in the criminal process. But a defendant who shows only that he made a compelled statement—such as a *Garrity* statement in an internal-affairs investigation—has not yet shown that his statement was possibly used in a criminal proceeding. Thus, he has not yet raised a Fifth Amendment issue that can be litigated.

Instead, to raise a Fifth Amendment issue, a defendant who simply made a compelled statement must also lay a firm foundation resting on more than suspicion that the State's evidence was tainted by exposure to that statement. *Slough*, 641 F.3d at 551.

5. The court of appeals reasonably relied on *Slough*'s application of *Kastigar* in this case, and this Court should, too.

To evaluate Appellant's three *Garrity* issues on appeal, the court of appeals used the three-part inquiry from *Slough*:

> Our inquiry in this appeal begins with the fundamental question of whether appellant's statements are in fact entitled to *Garrity* protection as "coerced statements ... obtained under threat of removal from office." *Garrity*, 385 U.S. at 500. For any statement that is protected by *Garrity*, we ask next whether the defendant carried his burden below to lay a firm foundation—resting on more than mere suspicion—that proffered evidence was tainted by exposure to the immunized statement. *Slough*, 641 F.3d at 551 (citing *United States v. North*, 920 F.2d 940, 949 (D.C. Cir. 1990)). And if the defendant carried that burden, then we determine whether the State proved, by a preponderance of the evidence, that all of its evidence to be used against the defendant proceeded from legitimate independent sources. *Slough*, 641 F.3d at 550; *see also Kastigar*, 406 U.S. at 461–62.

Oliver, 2020 WL 4581644, at *3. While *Slough* is not binding on Texas courts, the court reasonably relied on it as persuasive authority in the absence of any contrary binding authority.

5.1. *Slough*, as a federal circuit decision, isn't binding—but there is no binding authority.

Slough is a federal circuit decision. Admittedly, federal circuit decisions are not binding on state courts. *In re Meza*, 611 S.W.3d 383, 392–93 (Tex. Crim. App. 2020) (citing *Ex parte Evans*, 338 S.W.3d 545, 552 n.27 (Tex. Crim. App. 2011); *Mosley v. State*, 983 S.W.2d 249, 256 (Tex. Crim. App. 1998)). Indeed, on criminal matters, this Court is bound only by its own decisions and those of

the United States Supreme Court. *Id.*; *Pruett v. State*, 463 S.W.2d 191, 194 (Tex. Crim. App. 1970).

But neither this Court nor the Supreme Court have issued any decisions regarding this type of case—one in which a defendant made a compelled statement of which there is no evidence of exposure.

This Court has mentioned *Garrity* just once in a majority opinion. *See Chapman*, 115 S.W.3d at 6 n.15 (citing *Garrity* while discussing compelled statements by probationers); *see also Dansby v. State*, 448 S.W.3d 441, 453 (Tex. Crim. App. 2014) (Cochran, J., concurring) (citing *Garrity* to explain why coerced waivers of Fifth Amendment rights are neither voluntary nor effective); *Ex parte Moorehouse*, 614 S.W.2d 450, 453 (Tex. Crim. App. 1981) (Clinton, J., concurring) (explaining, in discussion of case law related to compelled statements, that *Garrity* protects a person from being "penalized" for exercising Fifth Amendment rights).

This Court has discussed *Kastigar* only slightly more often, and each time it has done so to address the scope of use and derivative use immunity. *See In re Medina*, 475 S.W.3d 291, 297–99 (Tex. Crim. App. 2015); *State v. Boyd*, 38 S.W.3d 155, 157 (Tex. Crim. App. 2001); *Butterfield v. State*, 992 S.W.2d 448, 449–50 (Tex. Crim. App. 1999); *Thomas v. State*, 723 S.W.2d 696, 702 (Tex. Crim. App. 1986); *Ex parte Wilkinson*, 641 S.W.2d 927, 929 (Tex. Crim. App.

1982); *Shorthouse*, 640 S.W.2d at 927–28; *see also Dansby*, 448 S.W.3d at 453, n.7 (Cochran, J., concurring); *Smith v. State*, 70 S.W.3d 848, 859–60, nn. 8–12 (Tex. Crim. App. 2002) (Cochran, J., concurring); *Raney v. State*, 982 S.W.2d 429, 430 (Tex. Crim. App. 1998) (Womack, J., dissenting); *Moorehouse*, 614 S.W.2d at 453 (Clinton, J., concurring).

And, as previously discussed, the United States Supreme Court has not addressed an immunity case in which exposure was disputed. *See Hubbell*, 530 U.S. at 30–32, 36, 40; *Garrity*, 385 U.S. at 494–95.

5.2. The court of appeals correctly concluded that *Slough*'s application of *Kastigar* makes sense in this case because Appellant made no showing of exposure.

With no binding authority from this Court or the Supreme Court, the court of appeals was free to view *Slough* as a persuasive application of *Kastigar*. This is especially true in light of the fact that the court gave proper deference to the trial court's factual findings.

5.2.1. The court of appeals properly gave deference to the trial court's express and implied factual findings.

The court of appeals held that Appellant's *Garrity* issues all involved the trial court's resolution of "mixed questions of law and fact involving Fifth Amendment rights," and therefore must be evaluated using a bifurcated standard of review. *Oliver*, 2020 WL 4581644, at *4 (citing *Alford v. State*, 358 S.W.3d 647, 652 (Tex.

Crim. App. 2012)). Under that bifurcated standard, the court gave "almost total deference to the trial court's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor," while it reviewed "de novo the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor." *Id*.

The court was correct to do this. Appellant raised three issues on appeal related to his *Garrity* statements: 1) the trial court's denial of his motions to suppress, 2) the trial court's denial of his motion to dismiss, and 3) the trial court's denial of his motion to recuse. A trial court's ruling on a motion to suppress is always reviewed under the bifurcated standard. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013); *Guzman v. State*, 955 S.W.2d 85, 87–91 (Tex. Crim. App. 1997). Similarly, when a court reviews a trial court's ruling on a motion to dismiss, the court should use the same bifurcated standard when the motion is based on Supreme Court case law that protects an enumerated constitutional right. *See Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002) (reviewing speedy-trial-dismissal ruling); *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999) (same). And a trial court's ruling on a motion to disqualify a prosecutor is likewise reviewed under the bifurcated standard. *Landers v. State*, 256 S.W.3d 295, 303 (Tex. Crim. App. 2008).

Appellant may respond that this standard of review is inappropriate, because it allows the court of appeals to defer to both express findings of fact and implied findings that are supported by the record. *See Turrubiate*, 399 S.W.3d at 150. He may point to *North I*, in which the D.C. Circuit said that an appellate court, when reviewing a district court's *Kastigar* ruling, "may not infer findings favorable to it." *North I*, 910 F.2d at 855.

But that restriction isn't part of the *Kastigar* analysis; it's part of the federal standard of review. In federal court, the district court's ruling on a *Kastigar* hearing is reviewed under a "clearly erroneous" standard, and the D.C. Circuit has held that it will not "infer" findings to decide whether the government met its burden of proving an independent source for its evidence. *Id.* (citing *Rinaldi*, 808 F.2d at 1583–4). The Court imposed that restriction because "the government bore the burden." *Rinaldi*, 808 F.2d at 1583. In other words, the restriction only applies in federal court, and it only applies once the government has been put to its burden in the first place.

5.2.2. Giving proper deference to the trial court's resolution of factual questions, the court determined that Appellant made no showing of exposure.

In rejecting Appellant's three *Garrity* issues, the court of appeals determined, first, that Appellant's statements to Lt. Maret

were compelled *Garrity* statements. *Oliver*, 2020 WL 4581644, at *3–4. But the court concluded that Appellant did not "lay a firm foundation that the State's evidence was tainted by exposure to those immunized statement[s]." *Id.* at *5–6.

The court of appeals expressly relied on certain facts, all of which are supported by the record. First, every fact witness that testified outside the presence of the jury at the *Garrity* hearing testified that his testimony was based on his own personal experience, either witnessing the shooting or the walk-through, and each of these witnesses testified that he had no knowledge of Appellant's statements to Lt. Maret.[52] *Id.* at *5.

And second, Jason Hermus, the chief of the Dallas County District Attorney's Public Integrity Unit, testified that 1) the District Attorney's Office "obtained a copy of the Balch Springs file," but 2) the file "was reviewed by a single officer, Lieutenant Lupita Rendon," who 3) was charged with "scrubbing" the file of *Garrity* material, after which 4) she was walled off from the investigation, and 5) Hermus did not even know that *Garrity* material existed until Appellant's counsel raised the issue a week before trial.[53] *Id.*

But that's not all. The record also supports a finding that none of the State's witnesses, the grand jury, or the prosecution team were

[52] *See* RR19:83–84, 98–100, 194–95, 248–51, 288–89; RR20:53–54, 81–82.
[53] *See* RR20:57–69.

exposed to Appellant's *Garrity* statements. Every trial witness during the State's case in chief who testified about the shooting and investigation would ultimately testify that his or her testimony was based on his or her own personal knowledge and that he or she was unaware of any *Garrity* statements.[54]

Lt. Maret, who did not testify as a fact witness at trial, testified outside the presence of the jury that he never spoke with any of the grand jury witnesses about the case.[55] Lt. Maret also testified that, at most, he showed Appellant's *Garrity* statement to Lt. Hurley and Chief Haber, and that he gave the internal-affairs file to Lt. Rendon.[56] The trial court confirmed that Lt. Rendon had then delivered that file to the court, who made it available to the defense.[57]

All of these facts, which the trial court explicitly or implicitly resolved when denying Appellant's motions, show that Appellant never offered anything more than suspicion that the State's

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[54] RR19:83–84 & 98–100 (Officer Tyler Gross), 194–95 (Vidal Allen), 248–51 (Kevon Edwards), 288–89 (Jeremy Seaton); RR20:53–54 (Det. Carranza), 87 (Seaton again), 145 (Eric Knight), 184 (Maxwell Everette), 197 (Maximus Everette), 210 (Quincy White), 222 (Jordan Patterson), 242 (Alandre Henderson), 263–64 (Reginald Mickens Sr.); RR21:85 & 87 (Grant Fredericks), 233 (Officer Jeremy Chamblee); RR22:10 & 17–18 & 24 (Nick Webb), 38 (Dr. Waleska Castro), 60 (Heather Francis), 88 (Dr. Stephen Lenfest), 105 & 108 (Dr. Philip Hayden), 155 (Officer Jefferey Baldwin), 166 (Officer Pedro Gonzalez); RR23:37 (Det. Garrick Whaley), 135 (Det. Carranza again).
[55] *Compare* RR19:317–320 *with* CR1:780 (listing names of grand jury witnesses).
[56] RR19:311–12, 334.
[57] RR13:10; RR20:69.

witnesses, evidence, or trial prosecutors were exposed to Appellant's *Garrity* statements.

Instead, Appellant brought allegations. One time, Appellant's attorney accused the District Attorney's Office of having "reviewed" Appellant's *Garrity* statements:

> We allege that the State of Texas had in its possession Mr. Oliver's *Garrity* statements given to internal affairs investigators at the City of Balch Springs. The Court can take judicial notice and the Court will recall that during pretrial hearings in this case you were told by Mr. Hermus with the District Attorney's office that they, in fact, had a copy of Mr. Oliver's *Garrity* statements. Also that they had, in fact, reviewed Mr. Oliver's *Garrity* statements, that it had been reviewed by an investigator in their office.[58]

But the court remembered what was actually said:

> I think that's probably more accurate from what I heard, that it had been reviewed by investigators from the office.
>
> … I also recall that there were great pains described to the Court to keep that separate from anybody involved with the trial as well. I do recall that as well.[59]

[58] RR17:7–8.
[59] RR17:8.

And then, on another occasion after several witnesses had testified outside the presence of the jury, Appellant's attorney argued to the court:

> The other part of the inquiry is what does the district attorney's office know, who's questioning the witness, because they've had access to that *Garrity* statement also.
>
> * * *
>
> I don't know what all [the witness] learned from the Dallas County DA's office either, who had access to the *Garrity* statements.[60]

Appellant never backed up these accusations. Not a single witness ever said that any of the prosecutors ever had access to a *Garrity* statement.

In light of the facts supported by the record and Appellant's failure to back up his accusations with evidence, the court of appeals correctly concluded that Appellant had made no showing of exposure—that he did not "lay a firm foundation that the State's evidence was tainted by exposure to those immunized statement[s]." *Id.* at *5–6. Because Appellant made no showing of exposure, there is no binding case law on how to apply the *Kastigar* test and put the

[60] RR19:254–55.

State to its burden. The court of appeals reasonably concluded that *Slough*'s application was the best way to do it.

5.3. This Court should adopt *Slough*'s application of *Kastigar* in cases where, as here, the defendant made no showing of exposure.

The court of appeals adopted *Slough*'s application of *Kastigar*, and this Court should, too. In criminal cases in Texas, defendants will, as here, raise *Garrity* claims in a motion to suppress, dismiss, or recuse based on a constitutional violation. But merely showing that the defendant made a *Garrity* statement does not show that there was a constitutional violation. Until a defendant makes some showing of exposure, the parties are already in substantially the same position as if the defendant had not made a statement, and the defendant's Fifth Amendment rights are preserved.

To allege a constitutional violation, the defendant must allege—and lay a firm foundation beyond mere suspicion—that there was exposure to the statement. *Slough's* application of *Kastigar* achieves this. By adopting *Slough*'s application of *Kastigar*, this Court will harmonize Texas criminal procedure with federal constitutional precedent.

6. Adopting *Slough* does not saddle defendants with the burden to disprove use.

Appellant takes issue with this. He calls it "burden shifting."[61] He says that when the court of appeals relied on *Slough*, it held "that Appellant failed to sustain his burden to prove that the [*Garrity*] statements were *used* against him either during grand jury proceedings or during his trial."[62]

But that isn't what the court said, and it isn't what *Slough* says. The court of appeals never held that Appellant had a burden to prove that his *Garrity* statements were used. Instead, the court held that Appellant had to make some showing of exposure:

> The trial court proceeded to hear arguments, during which counsel for appellant argued, as he has in this Court, that appellant bore no burden in the *Garrity* analysis. We disagree. It was appellant's burden to bring to the trial court some showing that the State's evidence had been tainted by exposure to those immunized statements. *Slough*, 641 F.3d at 551.

Oliver, 2020 WL 4581644, at *6.

Thus, Appellant's entire argument is based on a faulty premise. The *Slough* rule doesn't hold him to the burden that he claims it does. Appellant didn't have a burden to prove *use*; he had a burden to "bring … some showing" of *exposure*. *Id.* at *6. The court of

[61] Appellant's Br. at 12.
[62] Appellant's Br. at 6 (emphasis added).

appeals held Appellant to a reasonable burden of bringing some showing of exposure before the State would be put to the heavy burden of proving that it didn't use his statements and that its evidence was derived from legitimate independent sources.

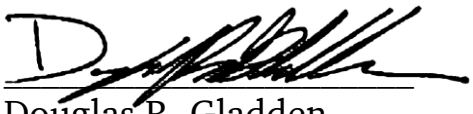
If Appellant had made some showing that the prosecution team or any witness had been exposed to his *Garrity* statement, then the State would have been put to its *Kastigar* burden. That burden requires the State to prove nonuse; the defendant does not have to disprove use. *Hubbell*, 530 U.S. at 40; *North II*, 920 F.2d at 943. But the State doesn't have that burden until the defendant makes some showing of exposure. Appellant didn't do that here. Because he didn't, the parties were already in substantially the same position as if Appellant had not made a statement at all. There was no need to make the State prove it never used something that it had never been exposed to in the first place.

The court of appeals correctly held that Appellant had a burden of laying a firm foundation, resting on more than suspicion, that the State's evidence was tainted by exposure to his *Garrity* statements. This Court should say so and affirm the court of appeals.

Prayer

The State prays that this Honorable Court affirm the judgment of the court of appeals.

Respectfully submitted,



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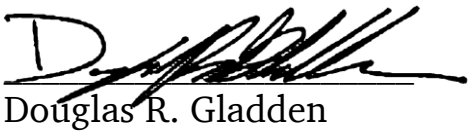

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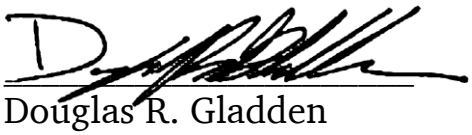
I certify that on March 29, 2021, a true copy of the foregoing brief was served on Robert K. Gill, attorney for Appellant, by electronic service to bob@gillbrissette.com, and that it was also served on the State Prosecuting Attorney, by electronic service to information@spa.texas.gov and stacey.soule@spa.texas.gov.



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